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MASTERPIECE CAKESHOP, LTD., *et al.*,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
COLORADO COURT OF APPEALS

BRIEF FOR DENVER METRO CHAMBER OF COMMERCE, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE COLORADO ANTI-DISCRIMINATION ACT REFLECTS THE VALUES OF THE COLORADO BUSINESS COMMUNITY 5

A. The Business Community's Values And The CADA Help Colorado Attract Talent And New Businesses 5

B. The Act Strengthens The Colorado Economy By Ensuring Certainty Of Service For Customers 11

C. Other States' Experiences Demonstrate The Potential Economic Effect Of Undermining Colorado's Climate Of Openness And Inclusivity 17

II. THE CADA'S BALANCE BETWEEN ANTIDISCRIMINATION PROTECTIONS AND FIRST AMENDMENT RIGHTS SHOULD BE MAINTAINED 19

A. Some Religious Accommodation Is Necessary, But Exempting Religiously Motivated For-Profit Enterprises Would Be Inappropriate 19

B. A Judicially Created Religious Exception To The CADA Would Have A Deep Economic Impact On Colorado 24

TABLE OF CONTENTS—Continued

Page

CONCLUSION 28

APPENDIX: Additional Amici Curiae 1a

TABLE OF AUTHORITIES

CASES

Page(s)

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INTEREST OF AMICI CURIAE[1]

This amicus brief is on behalf of the Denver Metro Chamber of Commerce and 26 members of the Colorado business community. The Denver Metro Chamber of Commerce (Chamber) has worked to strengthen Colorado businesses and the Colorado community for

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

150 years.[2] The Chamber works on behalf of its 3,000 members to encourage the adoption of laws and policies that will benefit businesses and maintain Colorado's strong economy. As part of that effort, the Chamber advocates for policies to attract new and expanding businesses to Colorado and to strengthen Colorado's education system to benefit the future workforce. The Chamber also trains and guides leaders in the Colorado business community about entrepreneurship and skills necessary to run a successful business, networking, and many other topics important for Colorado businesses and business owners.

Through its work with members and businesses that are considering starting in or expanding to Colorado, the Chamber has seen the importance of the emphasis that the Colorado business community places on openness and inclusion, and amici, as members of the business community, share those values. The protections against discrimination in places of public accommodation found in the Colorado Anti-Discrimination Act (CADA) reflect those values. Those protections also provide Colorado with an important advantage in attracting businesses and employees to the State.

More generally, the uniform prohibitions against discrimination in the CADA strengthen the State's economy, which is in the interest of all amici, as well as the entire Colorado business community. Colorado businesses thrive when customers know they will be treated equally and will receive service in any for-profit business that is open to the general public. Customers who do not have that certainty will patronize only certain businesses, or shop online or not locally, or avoid the transaction altogether. Under any of those scenari-

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[2] Additional amici are set forth in an appendix to this brief.

os, the Colorado economy will suffer. Allowing individual businesses or employees to claim exemptions from the CADA based on philosophical or religious objections to the obligation to serve all would undermine the values of openness and inclusion that have been essential to Colorado's economic success, and could diminish Colorado's distinctive appeal as a location for businesses to open and expand, for employees and their families to reside, and for tourists to visit.

SUMMARY OF ARGUMENT

The Colorado business community values openness and inclusion. Those values are essential to success in serving the broader Colorado community, which is diverse and welcoming to all; the Colorado economy has benefited and continues to thrive because of those principles. Indeed, those qualities are an important selling point when new businesses or talented individuals are considering where to expand or settle. When businesses decide to start in or move to Colorado, they can be certain that their employees and their customers (and their families) will have the broad and uniform protection of laws prohibiting invidious discrimination in public accommodations—protections that are not currently available in many States with which Colorado competes for talent. Although those protections may not be the only reason why businesses and employees choose Colorado, they reinforce the open and welcoming climate for which the State is known.

The Colorado business community includes many whose work reflects their religious values, as well as many whose work constitutes expressive activity, and it is equally important to Colorado's business climate that the State be welcoming to people of all faith and philosophical traditions (as reflected in the CADA's

prohibition against discrimination on the basis of "creed"). The CADA appropriately recognizes, however, that protection against discrimination in public accommodations cannot adequately protect the entire community if it is subject to exemptions based on a business owner's or employee's philosophical or religious objection. At the same time, the CADA protects free-exercise values and avoids entanglement of the government with religious institutions by exempting from its scope houses of worship and other places principally used for religious purposes. Those exemptions ensure that the government will not second-guess those institutions' religious beliefs and practices while ensuring all other, for-profit places of public accommodation will be open for business to all, regardless of an individual's race, sex, religion, or sexual orientation, or any other protected characteristic. The Act thus represents a democratic compromise that reconciles two important rights in a principled and practical manner that works for Colorado residents, visitors, and businesses. Coloradans and Colorado businesses have followed the CADA for nearly ten years, and it has proved workable and respectful of all viewpoints, while upholding the values of religious protection and nondiscrimination that are essential to the Colorado business and broader communities.

Amici have seen firsthand how the certainty those protections provide to customers and businesses provides a stable business environment that allows Colorado businesses to thrive. It is crucial to the State's continued economic growth that the CADA's thoughtful compromise remain in place, and that residents of and visitors to Colorado have the benefit of broad and uniform protections against discrimination. Without that benefit, Colorado's economy will lose the strength

it enjoys by ensuring certainty of service in any business open to the public and will also lose an important advantage in attracting companies, employees, and tourists. And if members of the community avoid trying new businesses, choose to search outside of Colorado for products or services, or avoid commercial transactions altogether in order to avoid the dignitary harm of being denied service, the entire Colorado economy will suffer.

ARGUMENT

I. THE COLORADO ANTI-DISCRIMINATION ACT REFLECTS THE VALUES OF THE COLORADO BUSINESS COMMUNITY

A. The Business Community's Values And The CADA Help Colorado Attract Talent And New Businesses

The Denver Metro Chamber of Commerce has worked to strengthen the Colorado economy and community for 150 years. Its membership includes 3,000 businesses with a total of 300,000 employees and innumerable local and visiting customers and clients. *See* Denver Metro Chamber of Commerce [hereinafter Chamber Website], *Join the Chamber*.[3] The Chamber provides numerous services to its members, including networking opportunities and training in topics such as successful entrepreneurship, leadership, and financial, technical, and other business skills. Chamber Website, *Member Benefits*.[4] Through the Denver Metro Cham-

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[3] *Available at* https://denverchamber.org/join/ (last visited Oct. 30, 2017).

[4] *Available at* https://denverchamber.org/members/member-benefits/ (last visited Oct. 30, 2017).

ber Leadership Foundation, the Chamber imparts the business community's values to new generations of Colorado leaders. Denver Metro Chamber Leadership Foundation, *How We Work*.[5] Those values emphasize inclusivity, collaboration, leadership, and responsibility. *Id.*

The Chamber also undertakes many policy activities that benefit its members, other businesses, and the community at large. For example, the Chamber focuses its policy advocacy efforts on strengthening the State's education system to ensure continued growth of a talented and prepared local workforce,[6] improving the health and wellness of the workforce,[7] and enhancing the State's infrastructure to improve connectivity and business efficiency.[8] The Chamber's member benefits, the values it stands for, and its advocacy measures are all directed at ensuring continued vitality for the Colorado economy, which benefits all amici, as well as the entire Colorado business community.

The Colorado business community is not homogeneous. It includes business owners and leaders, such as amici, who hold a multitude of viewpoints about business and personal matters and who adhere to a wide

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[5] *Available at* http://denverleadership.org/how-we-work/ (last visited Oct. 30, 2017).

[6] Chamber Website, *Education and Workforce Committee, available at* https://denverchamber.org/policy/education-and-workforce-committee/ (last visited Oct. 30, 2017).

[7] Chamber Website, *Health and Wellness Committee, available at* https://denverchamber.org/policy/health-wellness-committee/ (last visited Oct. 30, 2017).

[8] Chamber Website, *Infrastructure Committee, available at* https://denverchamber.org/policy/infrastructure-committee/ (last visited Oct. 30, 2017).

variety of religious creeds and philosophical tenets. Its customers and clients are likewise diverse and varied in age, race, education, wealth, and many other characteristics. U.S. Census Bureau, *Quick Facts: Colorado*.[9] The Colorado community prides itself on its inclusiveness, respect for other viewpoints, fostering of diversity, and efforts to welcome newcomers. *See* Denver Metro Chamber Leadership Foundation, *How We Work*, *supra* note 5; *see also Colorado Small Businesses Oppose Denying Services to LGBT Customers Based on Religious Beliefs*, Small Business Majority (Dec. 15, 2016).[10]

Many of Colorado's residents have moved there from other places, and the State's values of openness and inclusion have been, and continue to be, essential to allow Colorado to attract the best talent and new businesses. Those values are also crucial to ensure that Colorado's economy continues to be productive and vibrant. Colorado ranked fifth on *Forbes*' 2016 list of the "Best States for Business" and sixth on CNBC's 2017 list. *Best States for Business: Colorado*, Forbes, Nov. 2016[11]; Cohn, *America's Top 10 States for Business in 2017*, CNBC, July 11, 2017 (*Top 10 States*).[12] Colorado was ranked third in last year's CNBC list, but dropped slightly this year because the State's low unemployment rate is creating worker shortages. Cohn, *Top 10*

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[9] *Available at* https://www.census.gov/quickfacts/CO (last visited Oct. 30, 2017).

[10] *Available at* http://www.smallbusinessmajority.org/sites/default/files/research-reports/121516-CO-RFRA-poll-report_0.pdf.

[11] *Available at* https://www.forbes.com/places/co/ (last visited Oct. 30, 2017).

[12] *Available at* https://www.cnbc.com/2017/07/11/americas-top-10-states-for-business-in-2017.html.

States, *supra* note 12. CNBC celebrated Colorado's talented workforce, describing it as "one of the best workforces in the nation—smart and savvy." *Id.* Thus, it is even more imperative at this time that Colorado continue to draw talented people to join the workforce to maintain the State's economic growth and one of its greatest strengths, its people. A talented workforce and successful businesses go hand in hand. Chen, *Tolerance and Economic Performance in American Metropolitan Areas: An Empirical Investigation*, 26 Soc. F. 71, 76 (2011).

Studies show a strong correlation between thriving economies and inclusiveness and demonstrate that discrimination inflicts a heavy economic toll—including (but by no means limited to) discrimination on the basis of sexual orientation. *See, e.g.*, Chen, 26 Soc. F. at 92-93; Badgett et al., *Relationship Between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies*, Williams Inst. & USAID (Nov. 2014) (study of correlation between development and LGBT rights in 39 countries)[13]; *Inclusion Matters: The Foundation for Shared Prosperity* 53-56, World Bank (2013)[14]; Box, Note, *It's Not Personal, It's Just Business: The Economic Impact of LGBT Legislation*, 48 Ind. L. Rev. 995, 995-996 (2015) (collecting studies on economic impact of LGBT-protective legislation). "Social inclusion matters because exclusion is too costly. These costs are social, economic, and political and are

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[13] *Available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-inclusion-and-development-november-2014.pdf.

[14] *Available at* http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1265299949041/6766828-1329943729735/8460924-1381272444276/InclusionMatters_AdvanceEdition.pdf.

often interrelated. Moreover, whereas these costs accrue most visibly to individuals and to specific segments, they can impose a cost on society as well." *Inclusion Matters: The Foundation for Shared Prosperity* 54, *supra* note 14. The studies show "strong correlations between a location's wealth, prospects for economic investment, and ability to recruit talent, with its level of inclusiveness for LGBT persons." Box, 48 Ind. L. Rev. at 995. "While LGBT inclusiveness is not the only factor contributing to a state's economic vitality, it plays a key role in helping states progress in the economic development race." *Id.* at 995-996.

Amici's experiences are consistent with these studies: An environment that protects community members against discrimination is an important factor promoting economic vitality and growth. The 2017 CNBC list noted that a lack of antidiscrimination protections prevents some States on the list from reaching their full potential for economic growth. Cohn, *Top 10 States, supra* note 12 (noting North Carolina and Texas lack antidiscrimination protections). Naturally, people want to join and settle in a community where they feel welcome and comfortable, regardless of their race, sexual orientation, disability, or faith, to name but a few characteristics. *See* Michigan Dep't of Civil Rights, *Report on LGBT Inclusion Under Michigan Law* 81-90 (Jan. 28, 2013) (Michigan Report)[15]; Chen, 26 Soc. F. at 72, 92-93; Box, 48 Ind. L. Rev. at 1016. Inclusiveness is also important for attracting businesses with multiple locations that might need employees to relocate temporarily to work on particular projects. *See, e.g.*, Trubey, *Indiana Still Healing from Scars of RFRA*, Atlanta

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[15] *Available at* http://www.michigan.gov/documents/mdcr/MDCR_Report_on_LGBT_Inclusion_409727_7.pdf.

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[13] *Available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-inclusion-and-development-november-2014.pdf.

[14] *Available at* http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1265299949041/6766328-1329943729735/8460924-1381272444276/InclusionMatters_AdvanceEdition.pdf.

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[15] *Available at* http://www.michigan.gov/documents/mdcr/MDCR_Report_on_LGBT_Inclusion_409727_7.pdf.

Journal-Constitution, Apr. 2, 2016 ("All the talent cycles through Indiana[.] They have to feel welcome." (internal quotation marks omitted)).[16]

The importance of a values alignment among businesses, customers, and the broader community is evident in the ongoing competition for the recently announced second headquarters location of Amazon.com, Inc. Amazon recently requested proposals from cities or regions articulating why their area would be best suited for the company to establish its second base in the United States. Amazon, *Amazon HQ2 RFP* (Sept. 7, 2017).[17] In addition to accessibility, workforce, and technical requirements, Amazon specifically is looking for "a compatible cultural and community environment," including "the presence and support of a diverse population," as well as "excellent institutions of higher education, local government structure and elected officials eager and willing to work with the company, ... [and] [a] stable and consistent business climate." *Id.* at 5. Many cities and regions are competing for Amazon's new project, including Denver. *See* Amazon, *AmazonHQ2* (Amazon received "238 proposals from cities and regions in 54 states, provinces, districts, and territories across North America.").[18] What this competition shows is that a region that is intent on economic

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[16] *Available at* http://www.myajc.com/news/state--regional-govt--politics/indiana-still-healing-from-scars-rfra/f0lRpukhR4iD1XznoNkZYN/.

[17] *Available at* https://images-na.ssl-images-amazon.com/images/G/01/Anything/test/images/usa/RFP_3._V516043504_.pdf.

[18] *Available at* https://www.amazon.com/b?ie=UTF8&node=17044620011 (last visited Oct. 30, 2017).

growth will find it difficult to compete for businesses and customers if it is not welcoming to all.[19]

B. The Act Strengthens The Colorado Economy By Ensuring Certainty Of Service For Customers

In addition to attracting new businesses and talent, the business community's values of openness and inclusion also help existing businesses thrive. Some commentators have suggested that market forces will mitigate the effects of discrimination, and so neither the economy nor the efficacy of antidiscrimination laws will be undermined by allowing those with religious and philosophical objections to claim exemptions. That submission does not accord with the experience of the Colorado business community. *See* Br. for Amici Curiae Law and Economics Scholars. To the contrary, to maintain a strong economy based on values of openness and inclusion, it is essential that all businesses that deal with the public be open to all and treat all equally. A business's reputation is extremely valuable, and certainty in expectations is important for customers, em-

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[19] To be sure, if this Court were to adopt a constitutional rule recognizing an exemption from antidiscrimination laws for those with religious or philosophical objections, that rule would apply uniformly across the country. Nonetheless, such a rule would overrule the judgment made by the Colorado business community and the Colorado Legislature that broad and uniform protection against invidious discrimination both reflects the community's values and promotes economic activity by ensuring that all are served. It would depress economic activity by discouraging interactions where consumers are uncertain whether they will be welcome or will be turned away on the basis of their race, sex, religion, sexual orientation, or some other characteristic, and will diminish the advantage that Colorado currently enjoys by having in place a broad and uniform antidiscrimination law.

ployees, and businesses. An essential part of that certainty is that anyone who wants to purchase an item or service from a business can do so without worrying he will be denied because of a protected characteristic. Customers will avoid a region or a business if they are unsure how they will be treated or whether they will have access to goods and services. Michigan Report 78-79, 81-90, *supra* note 15.

In addition to local businesses, organizations hosting events and conferences in Colorado want to ensure that attendees will not face discrimination. For example, the National Football League was ready to move the 2015 Super Bowl from Arizona if the governor did not veto a law permitting religiously motivated discrimination on the basis of sexual orientation—much like the exemption requested in this case. Brady et al., *If Arizona Bill Becomes Law, Will NFL Move Super Bowl?*, USA Today, Feb. 25, 2014.[20] Similarly, the National Collegiate Athletic Association considered moving events from Indianapolis after Indiana passed a law that would have permitted discrimination in public places if grounded in religious belief. Horner, *Emmert Indicates RFRA Could Lead to Significant Changes for NCAA, Indiana*, Indianapolis Star, Mar. 30, 2015.[21]

It should not be surprising that employees, customers, tourists, and their families would prefer regions where they will be assured of receiving nondiscriminatory service and will not have to worry about

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[20] *Available at* https://www.usatoday.com/story/sports/nfl/2014/02/25/arizona-anti-gay-legislation-super-bowl-national-football-league/5821799/.

[21] *Available at* https://www.indystar.com/story/sports/2015/03/30/ncaa-president-mark-emmerts-concerns-about-rfra-remain/70676350/.

possible encounters with businesses that might refuse them service on a discriminatory basis. Discriminatory denial of service imposes serious injuries—both economic and dignitary. In *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), the Court recognized that the "fundamental object" of the federal public accommodation nondiscrimination law, Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–2000a-6 (2006 & Supp. 2010), "was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel*, 379 U.S. at 250 (quoting S. Rep. No. 88-872, at 16 (1964)). Justice Goldberg also emphasized that "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." *Id.* at 291-292 (Goldberg, J., concurring). A customer who cannot be assured, when she enters an establishment, that she will receive nondiscriminatory treatment may be inclined to avoid such commercial encounters—to the detriment of both the customer and the economy.

This Court has frequently stressed the costs of discrimination. In *Heckler* v. *Mathews*, 465 U.S. 728 (1984), the Court emphasized that "discrimination itself, ... by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Id.* at 739-740 (citation omitted). In *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), the Court upheld the Minnesota Human Rights Act against constitutional challenge,

recognizing that it "protects the State's citizenry from a number of serious social and personal harms." *Id.* at 625. Discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Id.* Most recently, in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), this Court acknowledged the impact on same-sex couples treated differently from their opposite-sex peers, highlighting the "stigma" and "disrespect" experienced by couples subjected to "demean[ing]" unequal treatment. *Id.* at 2600-2602, 2604.

The dignitary cost of discriminatory denial of access to public accommodations is particularly grave given the ancient tradition in the law that "one who employed his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain" and serve all customers, regardless of their membership in a protected class. *Heart of Atlanta*, 379 U.S. at 284 (Douglas, J., concurring). Similarly, as Justice O'Connor plainly stated in *United States Jaycees*, "A shopkeeper has no constitutional right to deal only with persons of one sex." 468 U.S. at 634 (O'Connor, J., concurring). In other words, background legal principles have long required places of public accommodation to serve all customers on a nondiscriminatory basis, and allowed them to turn away customers only where there was a legitimate business basis for doing so. *See* S. Rep. No. 88-872, at 9-11 (in debates over the Civil Rights Act of 1964, discussing the common law obligation of places of public accommodation to serve all customers equally). Where a place of public accommodation refuses service to someone on the basis of race, sex, religion, sexual orientation, or another discriminatory basis, the customer is likely to perceive that refusal of service as a message of

disapproval—that the customer is unsuitable. And it is not only the customer who will suffer as a result; the economic climate of the entire region may become associated with the discriminatory denial of service.

It is not sufficient to suggest, as some have done, that the cost of a discriminatory denial of service will be slight because the customer is likely to find the service she wants elsewhere, from a competing establishment. Many customers and clients who are seeking an important service may not live in a metropolitan community where competing outlets are available. For example, a couple living in a rural or exurban area that wishes to marry may not have a choice of venues that will host their wedding, or a choice of jewelers that will sell them wedding rings, or a choice of bakers that will sell them cakes, and searching the internet for alternatives may be laborious and impractical. And even when such choices exist, these onerous search costs—the requirement to go to shop after shop to see if someone will provide the necessary service—itself is a serious harm. It is not just a harm to the customer; if all businesses in the region are not open to all, the region may quickly lose its reputation as welcoming and customer-friendly, in addition to losing the income from those transactions.

Nor is it an answer to suggest, as some have done, that the community's interest in prohibiting discrimination on the basis of sexual orientation is not as compelling as its interest in eliminating other forms of discrimination. Both the customer and the business community suffer when service is refused on any basis that a community has come to recognize as invidious—including sexual orientation. Although the justices confronted solely racial discrimination in *Heart of Atlanta*, the same "humiliation, frustration, and embarrass-

ment" undoubtedly are felt by anyone denied access, products, or services on the basis of a characteristic covered by the CADA. As this Court explained in *United States Jaycees*, "That stigmatizing injury, ... is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." 468 U.S. at 625. The people of Colorado have made the judgment that their community—including their economy—is harmed when anyone is forced to suffer the expense, humiliation, frustration, and embarrassment from discrimination on the basis of "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry." Colo. Rev. Stat. § 24-34-601(2)(a) (2017).

The CADA's public accommodation provision reflects the business community's values of openness and inclusiveness in all areas of the Colorado economy. As described further in Part II, below, the Act carefully balances the needs of religious institutions to adhere to their principles with the imperative (drawn from a centuries-old common law rule) that businesses that are open to the public be genuinely open on equal footing to all patrons. If the Court were to upend the principled balance struck by the Colorado legislature and permit discrimination on the basis of sexual orientation (or any other prohibited characteristic) grounded in religious belief, it would have a deep impact on the values of the Colorado community and the vitality of the Colorado economy. Individuals who wish to patronize businesses might think twice if they could unexpectedly face discrimination when they visit restaurants, stores, gyms, hotels, or any number of other public places. Businesses would suffer as wary customers avoid commercial interactions out of fear of suffering the dignitary harms

this Court recognized in *Heart of Atlanta*, *Obergefell*, and other cases as the cost of discrimination.

C. Other States' Experiences Demonstrate The Potential Economic Effect Of Undermining Colorado's Climate Of Openness And Inclusivity

Recent developments in other States have shown that businesses recognize the economic benefits of a climate where employees, consumers, tourists, and their families will not have to worry about encountering discrimination. For example, the Arizona and Indiana legislatures passed laws that would allow businesses to discriminate against individuals in protected classes on the basis of the owners' personal religious beliefs. In Arizona, the governor vetoed the bill after the business community urged her to avoid damage to the State's economy and reputation. Rau et al., *Arizona Gov. Jan Brewer Vetoes Senate Bill 1062*, The Republic, Feb. 26, 2014.[22] In Indiana, the legislature soon amended the law, but Indianapolis alone lost more than $60 million in convention revenue. Bender, *Indiana's Religious Freedom Act Cost Indianapolis $60 Million In Lost Revenue*, Forbes, Jan. 31, 2016.[23] Had Indiana not quickly amended the law, it risked losing approximately $250 million for future events. McBride & Durso, *Indiana's Religious Freedom Restoration Act is Bad*

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[22] *Available at* http://archive.azcentral.com/news/politics/articles/20140226arizona-jan-brewer-1062-statement.html.

[23] *Available at* https://www.forbes.com/sites/andrewbender/2016/01/31/indianas-religious-freedom-act-cost-indianapolis-60-million-in-lost-revenue/#7f25c60b2e2a.

for Business, Center for American Progress (Mar. 31, 2015).[24]

A similar law is presently under consideration in Texas. The Texas Association of Business commissioned a study on the potential economic impact of various laws considered or enacted in other states, including Arizona, Louisiana, and Indiana, and extrapolated the economic impact on the Texas economy. The estimated impact of various proposed laws on the Texas economy ranged from $964 million over three years, with a corresponding loss of approximately 12,000 jobs, to a loss of as much as $8.5 billion. Texas Ass'n of Bus., *Keep Texas Open for Business: The Economic Impact of Discriminatory Legislation on the State of Texas* 12-13 (2016).[25]

Of course, it is up to each State to decide how far its public accommodations laws will reach, but Colorado's experience teaches that its economy obtains an advantage when the public understands that its businesses are open to all. The CADA reflects the Colorado business community's values of inclusion and openness, and both those values and the Colorado economy would suffer if the public could not depend on the guarantees of nondiscriminatory treatment embodied in the CADA.

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[24] *Available at* https://www.americanprogress.org/issues/lgbt/news/2015/03/31/110232/indianas-religious-freedom-restoration-act-is-bad-for-business/.

[25] *Available at* http://www.keeptxopen.org/wp-content/uploads/2016/12/KTOB-Economic-Study.pdf.

II. THE CADA'S BALANCE BETWEEN ANTIDISCRIMINATION PROTECTIONS AND FIRST AMENDMENT RIGHTS SHOULD BE MAINTAINED

A. Some Religious Accommodation Is Necessary, But Exempting Religiously Motivated For-Profit Enterprises Would Be Inappropriate

The CADA's exemption for religious institutions reflects the consensus of the Colorado community that both nondiscrimination and religious liberty are important rights that must be protected. Welcoming different faiths and their adherents is just as important to maintaining a vibrant community and economy as welcoming members of any other protected class. It therefore is important to Colorado's business climate that the CADA protects against discrimination in public accommodations on the basis of religion, just as it protects against discrimination on the basis of race, sex, disability, and sexual orientation. Moreover, the Chamber's own membership includes followers of many different faith traditions, and it is fair to assume many of the Chamber's members and other amici, like the owners of Masterpiece Cakeshop, view their work as influenced by their religious or philosophical principles. Many of the Chamber's members and amici likewise engage in activity that, although commercial, has an expressive component protected by the First Amendment.

The CADA strikes a reasonable balance between religious liberty and nondiscrimination in places of public accommodation. The Colorado business community has successfully lived by the Act's public accommodation nondiscrimination provision and its religious exemption since 2008. The exemption for places of worship and other places "principally used for religious

purposes" ensures that primarily religious entities, including those open to the public, may operate according to the precepts of their faith. But that narrow exception does not, and should not, extend to for-profit enterprises open to the general public that are not used principally for religious purposes. In this balance, both important rights are protected.

The legislature added the sentence in the public accommodations nondiscrimination provision exempting churches, synagogues, mosques, and other places "principally used for religious purposes" at the same time it added sexual orientation as a protected class. Act of May 29, 2008, § 6, 2008 Colo. Sess. Laws 1593, 1596. As the Colorado legislature recognized, accommodating religious observance by primarily religious entities, even in the public accommodation context, recognizes the importance of religious rights and the unique situation of houses of worship and other places "principally used for religious purposes." Exempting those institutions from certain nondiscrimination protections avoids the prospect of injecting the state into decisions about operating the entity in compliance with its faith tenets. *Cf. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 335-336 (1987) (upholding exemption for religious organizations from Title VII's prohibition against discrimination on the basis of religion).

The law exempts churches, synagogues, mosques, and other places that are "principally used for religious purposes," but does not define places that are "principally used for religious purposes" or explain to which entities the exemption would apply. Colo. Rev. Stat. § 24-34-601(1). No reported Colorado decision interprets that phrase. However, this is the type of interpretive question that courts routinely decide, and

courts applying the CADA's public accommodation provision could draw on the long tradition of religious accommodation in federal civil rights laws. For instance, Colorado courts have looked to case law applying Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2010), where the CADA's employment nondiscrimination provision parallels the federal statute. *See, e.g.*, *Williams* v. *Department of Pub. Safety*, 369 P.3d 760, 771 n.2 (Colo. App. 2015).

In this case, Masterpiece Cakeshop is not a place "principally used for religious purposes," as required for an exemption from the CADA's public accommodation nondiscrimination requirements. Colo. Rev. Stat. § 24-34-601(1). Masterpiece is a for-profit corporation wholly owned by Jack Phillips and his wife. Pet. ii; *Craig* v. *Masterpiece Cakeshop*, 370 P.3d 272, 287 (Colo. App. 2015). In their petition for a writ of certiorari, Mr. Phillips and Masterpiece argue that Mr. Phillips has "integrated" his faith into the business by treating his employees well, closing the business on Sundays, and choosing not to sell certain products, even aside from wedding cakes for same-sex couples. Pet. 4-6. But Masterpiece does not dispute that it is run as a for-profit business, which weighs against a determination that it is principally used for religious purposes. *Cf. Corporation of the Presiding Bishop*, 483 U.S. at 345 (Brennan, J., concurring in the judgment) (noting that nonprofit organizations should more easily satisfy the requirements for a religious exemption under Title VII); *id.* at 348-349 (O'Connor, J., concurring in the judgment) (same).

Of course, the protection of the Free Exercise Clause is not restricted to activities within houses of worship. But the line drawn in the CADA—broadly exempting places "principally used for religious pur-

poses" but otherwise covering places of public accommodation, including for-profit businesses—is both sensible and practical. First, the long common law tradition that for-profit places of public accommodation serve all members of the public equally, even when the business serves as a reflection of its owners' religious principles (as may often be the case), means that consumers have a legitimate expectation that they will not encounter discriminatory denial of service in such places. That tradition does not apply to religious institutions themselves, which historically have not been subject to regulation (either by statute or under the common law) as public accommodations. Second, whereas extending antidiscrimination laws to places used for religious purposes would raise serious concerns of entanglement and misunderstanding of the institution's mission, *see Corporation of the Presiding Bishop*, 483 U.S. at 336, the same is not true when a public accommodation law is uniformly applied to for-profit institutions open to the general public.[26]

The Colorado legislature achieved a careful, workable balance that both protects religious liberty and ensures that members of the public will not encounter invidious discrimination when they patronize for-profit

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[26] Indeed, it is possible that recognizing the constitutional exemption for which petitioners advocate would draw the government more into examining religious beliefs, rather than less. If a business claimed the right to refuse service to someone on the basis of the owner's or an employee's religious beliefs and the customer filed a discrimination complaint, an agency or a court could be required to examine whether the refusal of service was really motivated by religious beliefs or whether the claim of religious principle was merely a pretext for discrimination. That possibility raises the prospect of "intrusive inquiry into religious belief" that concerned the Court in *Corporation of the Presiding Bishop*, 483 U.S. at 339.

businesses that are open to the general public. Other States might reach a different judgment, but the balance reflected in the CADA reflects the values of the Colorado community, and avoids government involvement with or second-guessing of the religious principles of business owners and employees. It should not be undermined by allowing for-profit businesses that are open to the general public to discriminate on a basis that Colorado deems to be invidious because those businesses have a philosophical or religious objection to providing service to certain customers.

Moreover, as the Court of Appeals noted, nothing in the CADA prevents a business from posting a notice "in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA." *Masterpiece*, 370 P.3d at 288. The Court of Appeals pointed out that businesses "could also post or otherwise disseminate a message indicating that CADA requires it not to discriminate on the basis of sexual orientation and other protected characteristics." *Id.* Any of those alternatives would allow businesses and their owners to comply with the Act while also exercising their First Amendment right to communicating that commercial transactions are not necessarily reflective of the owners' personal beliefs.

Furthermore, the CADA does not dictate which services or products any business must provide; it says only that the services and products a business chooses to offer must be offered without regard for a customer's disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry. That basic requirement of owners who choose to open their spaces to the public should continue be upheld.

B. A Judicially Created Religious Exception To The CADA Would Have A Deep Economic Impact On Colorado

Upending the CADA's balance by authorizing an exemption for a commercial enterprise on the basis of religious objection would have a wide-ranging impact on Colorado's public accommodation antidiscrimination law. It would allow at least some discrimination on all the bases prohibited in the CADA, not just sexual orientation, as long as the discrimination were based on a sincere religious belief. It is not hard to imagine the claims that will follow this case: A jeweler may argue that his religion forbids him from selling wedding rings to an interfaith couple; a shop owner may refuse service to women customers to avoid contact prohibited by his religion; a cake baker who disagrees with a particular religion's refusal to recognize same-sex marriages may refuse to bake a wedding cake for adherents of that religion; a florist's employee could refuse to complete an order if a customer tries to send flowers to her same-sex spouse to celebrate a birthday or congratulate a promotion; a restaurant owner may argue that his religious principles are infringed by hosting a celebration for an interracial marriage. There may be many more such claims, each testing the scope of the CADA and the First Amendment, leading to complaints to the Colorado Civil Rights Commission and intensive, expensive inquiries into the merits of the claim.

Such disruption will damage Colorado's welcoming reputation, the vitality of its economy as a whole, and its advantage in attracting individuals and businesses. That is no small matter for Colorado businesses; in 2012, the last year for which data is available, more than $80 billion was spent in Colorado on accommodations, food service sales, and retail sales alone. United

States Census Bureau, *Quick Facts: Colorado*, *supra* note 9.

The effects of undermining Colorado's nondiscrimination protections in public accommodations could be felt immediately. The Denver region is currently competing for twelve new financial industry expansion or relocation projects alone, which together would provide 4,000 new jobs to the area. Loder, *Passive Migration: Denver Wins Big as Financial Firms Relocate to Cut Costs*, Wall Street Journal, July 26, 2017.[27] The region is also competing for the Amazon headquarters project. Amazon, *AmazonHQ2*, *supra* note 18. Numerous other companies have recently announced plans to relocate or expand into the Denver region, including an Amazon fulfillment center, Transamerica, and SyncHR. Denver Relocation Guide, *Amazon Fulfillment Center in Aurora, CO Coming Soon*[28]; Denver Relocation Guide, *Transamerica Adding 200 Jobs to Denver Location*[29]; Denver Relocation Guide, *SyncHR Moves Headquarters to Denver, Creates Local Jobs* (July 20, 2016).[30] Many of those companies are relocating offices or employees from California and New York, among other high-cost regions, and have a choice of regions to which they can move. The experience of Colorado's business

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[27] *Available at* https://www.wsj.com/articles/passive-migration-denver-wins-big-as-financial-firms-relocate-to-cut-costs-1501070404.

[28] *Available at* http://www.denverrelocationguide.com/Amazon-Fulfillment-Center-in-Aurora-CO-Coming-Soon/.

[29] *Available at* http://www.denverrelocationguide.com/Transamerica-Adding-200-Jobs-to-Denver-Location/ (last visited Oct. 30, 2017).

[30] *Available at* http://www.denverrelocationguide.com/SyncHR-Moves-Headquarters-to-Denver-Creates-Local-Jobs/.

community is that the State's welcoming climate and its broad and uniform antidiscrimination law help it make the case that businesses and employees should choose Colorado. As explained previously, a constitutional rule announced by this Court exempting those with religious or philosophical objections from antidiscrimination laws would apply in all States and localities. Such a rule, however, would impact certain States and localities differently than others. In those States and localities with existing uniform antidiscrimination protections, an exemption rule would alter consumer expectations, disrupt economic activity by introducing uncertainty into commercial interactions, and diminish the existing economic advantage to Colorado and similar jurisdictions from having in place a broad and uniform antidiscrimination law.

By contrast, States like Indiana have seen that companies will pull out of agreements to expand if they think a State does not align with their antidiscrimination values. For example, Angie's List cancelled a planned $40 million expansion of its headquarters in Indianapolis in response to that state's enactment of a Religious Freedom Restoration Act that allowed discrimination in places of public accommodation on the basis of religious belief because "the new law hurts the company's ability to recruit and retain top-flight talent." Evans, *Angie's List Cancelling Eastside Expansion Over RFRA*, Indianapolis Star, Mar. 28, 2015.[31]

Exposing Colorado residents and visitors to the risk of encountering discrimination based on race, gender, religion, or sexual orientation—even where that

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[31] *Available at* http://www.indystar.com/story/money/2015/03/28/angies-list-canceling-eastside-expansion-rfra/70590738/.

discrimination is rooted in religious or philosophical principles—would adversely affect the entire Colorado economy through decreased market participation and productivity and increased social costs. *See Inclusion Matters: The Foundation for Shared Prosperity* 54, *supra* note 14. And the impact of any judicially created exception to the CADA's public accommodations provision will not be limited only to those people directly protected by the law; it will also affect their spouses, parents, children, family members, friends, and colleagues. Michigan Report 65-68, 81-82, *supra* note 15. A religious-based exception from the generally applicable law for entities that are not primarily religious would upset the expectations of Colorado citizens and visitors, create confusion and mistrust, and undermine the environment of tolerance to all, including followers of all faiths and religious institutions, that the Colorado legislature achieved through the CADA's public accommodations provision.

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In short, the Act provides a workable framework for Colorado businesses and customers that balances vital protection for practitioners of every faith in their places of worship and other public places principally used for religious purposes. The CADA does not prohibit businesses and business owners from deciding which services or products to offer to all customers, including those protected by the Act. Nor does it prohibit business owners from posting a nondiscriminatory statement disclaiming endorsement of any customer's conduct. The Act is consistent with the Court's public accommodation protections and is necessary to ensure the continued growth and vitality of the Colorado economy.

CONCLUSION

The judgment of the Colorado Court of Appeals should be affirmed.

Respectfully submitted.

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